

**IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA**

**KATHERYN EMERY, ACTING DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO. 21-C-345**

**THE JOURNAL PUBLISHING COMPANY,**

**Defendant.**

**CONSENT DECREE**

**WHEREAS**, Plaintiff, Kathryn Emery, Director<sup>1</sup>, Division of Water and Waste Management, West Virginia Department of Environmental Protection (hereinafter referred to as “WVDEP” or “Plaintiff”) filed the Complaint herein alleging that The Journal Publishing Company (hereinafter referred to as “Journal Publishing” or “Defendant”) is in violation of the West Virginia Aboveground Storage Tank Act (hereinafter referred to as “ASTA”), W. Va. Code §§ 22-30-1 through 22-30-26, and various ASTA associated rules and regulations; and

**WHEREAS**, both prior to the filing of the complaint and at the time of the filing of the complaint, Journal Publishing was alleged by WVDEP to be operating its aboveground storage tank facility in violation of the ASTA; and

**WHEREAS**, Journal Publishing is not admitting to any factual and legal allegations made by the WVDEP regarding its operation of its aboveground storage tank

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<sup>1</sup> At the time of the filing of the complaint, Kathryn Emery was the Acting Director for the Division of Water and Waste Management for the West Virginia Department of Environmental Protection. Since filing the complaint, Ms. Emery has gone from Acting Director to Director of the Division of Water and Waste Management.

facility and is reserving all rights and defenses available regarding liability or responsibility in any proceedings regarding Defendant other than proceedings, administrative or civil, to enforce this Consent Decree; and

**WHEREAS**, the parties have agreed that settlement of this matter is in the public interest and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter;

**NOW, THEREFORE**, it is hereby **ORDERED, ADJUDGED, and DECREED** as follows:

**I. JURISDICTION AND VENUE**

This Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code § 22-30-16(a). Venue is proper in the Circuit Court of Berkeley County pursuant to W. Va. Code § 22-30-16(a) because Journal Publishing operates an aboveground storage tank facility in Berkeley County located at or near 207 West King Street in Martinsburg, West Virginia, and because the alleged violations that are the subject of this action occurred in Berkeley County.

**II. APPLICATION OF CONSENT DECREE**

This Consent Decree applies to, and is binding upon, Journal Publishing, its officers, directors, employees, successors and assigns.

**III. INJUNCTIVE RELIEF**

The Court orders Journal Publishing to provide WVDEP with an approvable closure report within thirty (30) days of the effective date of this Consent Decree. For purposes of this Consent Decree, an “approvable closure report” is a closure report using

the Aboveground Storage Tank closure report template and including all applicable attachments/documents required in Section X of said template.<sup>2</sup>

#### **IV. CIVIL PENALTY**

In settlement of WVDEP's claims in the Complaint relating to alleged violations of the ASTA, Journal Publishing shall pay a civil penalty to WVDEP of Fifty Thousand Dollars (\$50,000.00) under the following conditions:

- A. Fifteen Thousand Dollars (\$15,000.00) of the civil penalty shall be paid in a lump sum by Journal Publishing to WVDEP within thirty (30) days of the effective date of this Consent Decree.
- B. Thirty-Five Thousand Dollars (\$35,000.00) of the civil penalty shall be held in abeyance and shall not be considered due and owing to WVDEP except under either or both of the following two (2) conditions outlined in this paragraph. First, if Journal Publishing fails to provide WVDEP with an approvable closure report within thirty (30) days of the effective date of this Consent Decree, Defendant shall pay WVDEP the remaining \$35,000.00 civil penalty held in abeyance. Second, if Journal Publishing fails to pay WVDEP the initial \$15,000.00 civil penalty within thirty (30) days of the effective date of this Consent Decree, Journal Publishing shall pay WVDEP the remaining \$35,000.00 civil penalty held in abeyance.
- C. Payment of the civil penalty referred to in Section IV of this Consent Decree shall be submitted to the Chief Inspector, Environmental Enforcement, West Virginia Department of Environmental Protection, 601 57<sup>th</sup> Street SE,

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<sup>2</sup> "Section X" referred to in this sentence refers to Section X of the Aboveground Storage Tank closure report template and not Section X of this Consent Decree.

Charleston, West Virginia 25304, by check payable to the "West Virginia Department of Environmental Protection."

## **V. FUNDING**

Performance of the terms of this Consent Decree by Journal Publishing is not conditioned on the receipt of any grant or loan funds. In addition, performance is not excused by the lack of any grant or loan funds, or by the processing of any application for the same.

## **VI. FORCE MAJEURE**

If a Force Majeure event occurs which causes or may cause a violation of any provision of this Consent Decree by Journal Publishing, it shall notify the WVDEP in writing within seven (7) business days of the date on which the Defendant has knowledge or should have had knowledge that the event may or will cause a violation. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and to be taken by Journal Publishing to minimize the violation and the timetable by which those measures will be implemented. The Defendant will adopt all measures to avoid or minimize any such violation. Journal Publishing shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

Force Majeure is an event that is outside the control of the Defendant, such as war, a labor stoppage, riot, crime, or act of God, and makes it impossible to comply with the terms of this Consent Decree.

If the WVDEP agrees that any violation of this Consent Decree is caused solely by circumstances beyond the control of Journal Publishing, it shall be excused as to that

violation for the period the violation continues due to such circumstances. The Defendant's time for performance shall be extended for a period not exceeding the delay resulting from such circumstances. In the event the WVDEP does not agree, Journal Publishing may submit the matter to the Court for resolution. The burden of proving that any delay was caused solely by circumstances beyond the control of the Defendant and the length of such delay shall rest with Journal Publishing. Failure by the Defendant to comply with the notice requirements of this section shall render this section void and of no force and effect as to the incident involved and shall constitute a waiver of Journal Publishing's right under this provision to obtain an extension of its obligations based on that incident.

Compliance with any requirement of this Consent Decree, by itself, shall not constitute compliance with any other requirement. The Defendant must make an individual showing or proof regarding each delayed incremental step or other requirement for which an extension is sought.

Unanticipated or increased costs, by themselves, shall not serve as a basis for relief under this section. Compliance with the provisions of this Consent Decree is not dependent on the receipt of state or federal grants or payments.

## **VII. RETENTION OF JURISDICTION**

The Court shall retain jurisdiction over this matter to interpret and enforce the terms of this Consent Decree.

## **VIII. MODIFICATIONS**

This Consent Decree contains the entire agreement between the parties. It may not be enlarged, modified, or altered, unless made in writing and approved by the parties and the Court.

## **IX. TANK REGISTRATION AND OTHER LAWS AND REGULATIONS**

This Consent Decree is not, and shall not be interpreted to be, an aboveground storage tank registration or modification of an aboveground storage tank registration under the ASTA, nor shall it relieve Journal Publishing of any other obligation imposed by the ASTA or any tank regulations required under the ASTA, except as expressly provided herein, nor shall it in any way relieve Defendant of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Decree. Any new aboveground tank registration or modification of an aboveground tank registration must be obtained in accordance with applicable federal and state laws and rules and regulations.

## **X. PUBLIC NOTICE**

The parties acknowledge and agree that final approval of this Consent Decree is subject to public notice and comment as provided in W. Va. Code R. § 47-65-7.1. The public shall have at least thirty (30) days to make any comments on this Consent Decree, and the WVDEP reserves the right to withhold or withdraw its consent if the comments indicate that this Consent Decree is inappropriate, improper or inadequate. Journal Publishing consents to entry of this Consent Decree without further notice. If for any reason, the Court should decline to approve this Consent Decree in the form presented,

this agreement is voidable at the sole discretion of the WVDEP, and the terms of the agreement may not be used as evidence in any litigation between the parties.

#### **XI. EFFECTIVE DATE**

The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

#### **XII. TERMINATION**

Termination of this Consent Decree shall be by order of the Court upon application by any party, provided all of the following conditions have been met: (1) Journal Publishing has achieved complete compliance with all requirements of this Consent Decree; (2) the Defendant has paid all civil penalties required herein; and (3) all motions and other proceedings concerning this Consent Decree have been completed and are no longer subject to further judicial review, and all relief resulting from such motions or other proceedings have been fully satisfied.

#### **XIII. PARTIES BOUND BY CONSENT DECREE**

This Consent Decree is binding on Journal Publishing's successors and assigns and shall remain in effect until the Defendant or its successors or assigns demonstrate they have complied with all the terms of this Consent Decree.

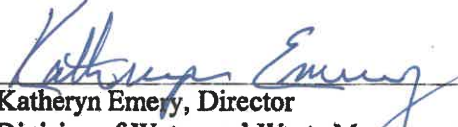
#### **XIV. SIGNATORIES AUTHORIZED**

Each of the signatories to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the party to the Consent Decree so represented by him or her.


It is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2022.

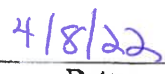
\_\_\_\_\_  
JUDGE


We hereby consent to the entry of this Decree.

  
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Kathryn Emery, Director  
Division of Water and Waste Management  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, West Virginia 25304

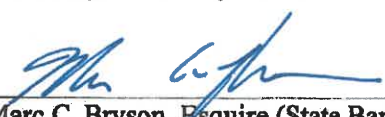
  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Andrew F. Tarr, Esquire (State Bar No. 5033)  
Office of Legal Services  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, West Virginia 25304  
(304) 926-0460  
Counsel for Plaintiff

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Duane D. Wittman, Treasurer  
The Journal Publishing Company  
1500 Main Street  
Wheeling, West Virginia 26003

  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Marc C. Bryson, Esquire (State Bar No. 10589)  
Steptoe & Johnson PLLC  
Chase Tower, 8<sup>th</sup> Floor  
700 Virginia Street, East  
Charleston, West Virginia 25301  
(304) 353-8149  
Counsel for Defendant

  
\_\_\_\_\_  
Date